Nos. 77-406 and 77-434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

FEDERAL COMMUNCATIONS COMMISSION and THE UNITED STATES OF AMERICA, et al., *Respondents.*

THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner,*

v.

FEDERAL COMMUNCATIONS COMMISSION and THE UNITED STATES OF AMERICA, et al., *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 1-15) [1] is not yet reported. The memorandum opinion

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[1] "Pet.App." refers to "Petitioners' Joint Appendices".

and order of the Federal Communications Commission (Pet.App. 16-44) is reported at 56 F.C.C.2d 14 (1975).

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1977 (Pet.App. 3). The petition in No. 77-406 was filed on September 15, 1977, and the petition in No. 77-434 was filed on September 19, 1977. The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. 1254(1); Sections 402(a) and 405(j) of the Communications Act of 1934, as amended 47 U.S.C. 402(a), 405(j); and 28 U.S.C. 2341, 2344, and 2350.

QUESTION PRESENTED

Whether the Federal Communications Commission possesses and properly asserts statutory authority to regulate facilities located within one state which are used to provide both interstate and intrastate communications, where the FCC concludes that it is contrary to the public interest and technically and practically difficult to separate the facilities between interstate and intrastate communications functions.

STATEMENT

A. Background

In 1971, on the basis of a comprehensive rule making proceeding, the FCC adopted a general policy in favor of the free entry of new common carriers into the business of providing specialized communications service.[2] The FCC reaffirmed its view that the established carriers, which had earlier manifested "intransigence" towards interconnecting its facilities with those of the first specialized carrier to make application,[3] should permit interconnection of intercity and local distribution facilities on reasonable terms and conditions to the facilities of the new carriers.[4] This decision was affirmed by the Ninth Circuit.[5]

[2] *Specialized Common Carrier Inquiry*, 29 F.C.C.2d 870 (1971), reconsideration denied, 31 F.C.C.2d 1106 (1971).

Thereafter, in 1974, the FCC held that Bell and the Associated Bell System Companies had engaged in unlawful conduct in refusing or delaying to provide the physical interconnection of their facilities necessary for the specialized carriers to provide their authorized services, and directed AT&T and the Bell Companies to furnish to specialized carriers the interconnection facilities essential to the rendition of all of their authorized services.[6] Included among these authorized services were Foreign Exchange (FX) service[7] and Common Control Switching Arrange-

[3] *MCI Telecommunications, Inc.*, Initial Decision, 18 F.C.C.2d 979, 1007 (1967), Decision, 18 F.C.C.2d 953, 965 (1969), reconsideration denied, 21 F.C.C.2d 190 (1970), modifications granted, 27 F.C.C.2d 380 (1971).

[4] Note 2 supra, 29 F.C.C.2d at 940.

[5] *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975), cert. denied, *National Assn. of Regulatory Utility Commissioners* v. *FCC*, 423 U.S. 836 (1975).

[6] *Bell System Tariff Offerings*, 46 F.C.C.2d 413, 435-36, 438 (1974).

[7] Foreign exchange (FX) is a private line service that is partially "switched", permitting a telephone subscriber in one exchange to maintain a local telephone in another exchange area as if his telephone were actually located in that other exchange area. 46 F.C.C. 2d at 418 fn. 5; National Association of Regulatory Utility Commissioners (NARUC) petition, at 4-5, fn. 4.

ments (CCSA).[8] This decision was affirmed by the Third Circuit.[9]

In 1971 the FCC also issued a declaratory ruling that the Communications Act of 1934, as amended,[10] preempts state regulation of the terms and conditions of the interconnection of facilities (in that case telephone terminal equipment) used for both interstate and intrastate communications services, when the state or local regulation conflicts with Federal regulation of those facilities.[11] That decision was affirmed by the Fourth Circuit,[12] and in collateral cases by the First Circuit [13] and the Supreme Court of Nebraska.[14]

In 1975 and 1976 the FCC exercised its primary authority over facilities used in both interstate and intrastate communications to establish a terminal equipment registration program, precluding incon-

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[8] A CCSA is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through a switchboard on the customer's premises. 46 F.C.C.2d at 418 fn. 5; NARUC petition at 5 fn. 5.

[9] *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), cert. denied, *AT&T* v. *FCC*, 422 U.S. 1026 (1975), rehearing denied, 423 U.S. 886 (1975).

[10] 47 U.S.C. 151 et seq.

[11] *Telerant Leasing Corp.*, 45 F.C.C.2d 204 (1974).

[12] *North Carolina Utilities Commission* v. *FCC (North Carolina I)*, 537 F.2d 787 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976).

[13] *Puerto Rico Telephone Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977).

[14] *Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W.2d 531 (1975).

sistent state and local regulation.[15] These decisions were also affirmed by by the Fourth Circuit.[16]

B. Facts of the Case

The present case involves facilities located in California which are used by a customer of Southern Pacific Communications Company (SPCC) for its national FX-CCSA communications network.[17] SPCC provides an interstate coast-to-coast specialized communications service, including FX and CCSA service, under authorizations and radio licenses issued by the FCC pursuant to its *Specialized Common Carrier* decision.[18] SPCC also holds a California intrastate certificate of convenience and necessity issued by a petitioner herein, the Public Utilities Commission of the State of California (CPUC), under an interim opinion which precludes SPCC from "[a]ny connection of private line circuits to the exchange network", including "any connection similar to foreign exchange service." [19]

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[15] *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, First Report and Order, 56 F.C.C.2d 593 (1975), Second Report and Order, 58 F.C.C.2d 736 (1976).

[16] *North Carolina Utilities Commission* v. *FCC (North Carolina II)*, 552 F.2d 1036 (4th Cir. 1977), cert. denied, No. 76-1675, 46 L.W. 3191 (Oct. 3, 1977).

[17] The Commission's decision under review is applicable to interconnections in both California and Oklahoma. 56 F.C.C.2d at 14-25 (Pet.App. 16-44) passim. However, since petitioners have addressed themselves only to the facilities in California, SPCC's brief in opposition will be directed only to those facilities.

[18] Note 2 supra.

[19] *Pacific Telephone and Telegraph Co.* v. *Southern Pacific Communications Co.*, Decision No. 84167 (Cal. PUC Mar. 4, 1975) (Pet. App. 45-124, at 114).

Acting solely in reliance upon its authorizations and licenses issued under the statutory jurisdiction and orders of the FCC, and not in any part in reliance upon its intrastate certificate issued by CPUC, SPCC in March, 1975, ordered interconnection facilities from the Pacific Telephone and Telegraph Company (PT&T) to connect the SPCC private line circuit between San Diego and Los Angeles to a CCSA switching machine at Los Angeles, so as to provide access by a CCSA network of American Airlines which stretches across the United States. Until the interconnection, the nationwide private line network of American Airlines stopped at Los Angeles, and could not reach San Diego. With the interconnection, a call could originate anywhere in the United States, including locations in California, on the CCSA network of American Airlines; be carried over intermachine trunk lines to the Los Angeles CCSA switcher; and be carried over SPCC lines from Los Angeles to SPCC's terminal in San Diego and over a leased PT&T local distribution facility to a customer's premises in San Diego. It was estimated that 82% of the calls on the American Airlines network terminating at San Diego would in fact be originated from points outside of the State of California.

Although advised by SPCC that it was relying solely on its FCC authorizations, and by the FCC's Common Carrier Bureau that in the Bureau's view the interconnection sought by SPCC was interstate in character subject to FCC jurisdiction, PT&T filed a complaint with the CPUC alleging SPCC's action in seeking interconnection was "in direct and flagrant

violation" of the CPUC's prohibition on intrastate FX service by SPCC.[30]

C. The FCC Proceeding

SPCC thereupon filed a petition on June 16, 1975, with the FCC for declaratory rulings to reaffirm the primacy of the FCC's jurisdiction over the facilities, and for enforcement of the earlier cease and desist orders requiring AT&T and the Associated Bell System Companies to furnish FX and CCSA interconnection on reasonable terms and conditions. Comments in opposition were filed jointly by AT&T, PT&T, and Southwestern Bell Telephone Company, and by NARUC, CPUC, and the United States Independent Telephone Association (USITA).

On October 9, 1975, the FCC issued a memorandum opinion and order affirming its jurisdiction over the facilities. The FCC ruled it would be inappropriate to await the outcome of state proceedings or to convene a Federal-State Joint Board, since SPCC's petition presented the legal question of jurisdiction whether the facilities were interstate, which did not require state interpretations. 56 F.C.C.2d at 18, Pet. App. at 25-26. The FCC described and analyzed the California facilities as "part of dedicated interstate private line networks", 56 F.C.C.2d at 19, Pet.App. at 27, and as "an integral part of a dedicated interstate communications network." 56 F.C.C.2d at 21, Pet. App. at 32. The FCC refused to limit the use of the facilities to interstate communications. It found that leaving intrastate transmissions to a separate FX

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[30] The complaint is attached to the FCC's ruling, 56 F.C.C.2d at 22-23, Pet.App. at 35-39.

line subject to state restrictions would require the customer to maintain two redundant facilities or to invest in expensive additional equipment simply because of jurisdictional conflicts. This was "clearly not in the public interest" and contrary to the mandate of Section 1 of the Communications Act[21] to make available a rapid, efficient, unified national communications service, 56 F.C.C.2d at 19, Pet.App. at 28. It was found to be "technically and practically difficult" to "split" the facilities between interstate and intrastate transmission functions. 56 F.C.C.2d at 19, Pet.App. at 29. The FCC ruled that the facilities were interstate, even though capable of intrastate service as well, and thus under Federal jurisdiction, 56 F.C.C.2d at 21, Pet. App. at 32. While the FCC therefore required the Associated Bell System Companies to interconnect its local facilities to the SPCC private lines as an intrastate segment of the interstate service, it made clear that it did not intend to assume jurisdiction over local exchange telephone service, 56 F.C.C.2d at 21, Pet. App. at 33.

D. Decision of the Court of Appeals

On petitions for review, the District of Columbia Circuit (Chief Judge Bazelon and Circuit Judge Tamm for the majority) held that the FCC did not exceed its authority in asserting jurisdiction over the facilities, located entirely within a state but used for both interstate and intrastate communications; that the FCC reasonably concluded it was technically difficult and impractical to separate the facilities between their interstate and intrastate functions; that the

[21] 47 U.S.C. 151.

FCC's position that the physical location of the facilities was not determinative was logical and supported by substantial authority; and, quoting from the Fourth Circuit,[22] that the FCC's declaration of authority over the interconnection of the facilities with the national network was "a proper and reasonable assertion of jurisdiction conferred by the Act." Pet.App. at 1-6. Circuit Judge Robinson, dissenting, argued that the record before the FCC was inadequate to support the FCC's ruling that it was "technically and practically difficult" to separate interstate FX and intrastate FX. Pet.App. at 7-15.

ARGUMENT

1. The decision of the District of Columbia Circuit is consistent with applicable decisions of this Court and reflects the direct application of settled law governing federal-state relationships under circumstances where federal and state regulations are inconsistent.

One hundred and fifty years after *Gibbons* v. *Ogden*,[23] it is not necessary that this Court now examine again the doctrine that Federal law is paramount over inconsistent state regulation affecting interstate commerce. Where Federal and State regulations impose conflicting duties on a carrier, "one must yield, and that one is the state law."[24] It is an "elementary and long settled doctrine" that "there can be no divided authority over interstate commerce and that the regu-

[22] Note 12 supra, 537 F.2d at 794.

[23] 9 Wheaton (22 U.S.) 1 (1824).

[24] *Gulf, Colorado & S.F. Ry. Co.* v. *Hefley*, 158 U.S. 98, 103 (1895).

lations of Congress on that subject are supreme."[25] Where interstate and intrastate services are inextricably intertwined, so that the efficient performance of either is dependent upon the efficient performance of the system as a whole, state regulation of intrastate service is subordinate to the performance by the carrier of its Federal duty to render efficiently services in interstate commerce."[26]

Under the commerce clause, the FCC has been given expansive powers by the Congress. The FCC serves as "the single Government agency" with "unified jurisdiction" and broad regulatory authority over all forms of electrical communication." It "is confirmed by the language of the statute and by judicial decisions" that the Communications Act contemplates the regulation of interstate communications "from its inception to its completion" at the ultimate destination.[28]

Petitioners are wholly incorrect in suggesting that the FCC did not give proper recognition to the intrastate use of the facilities, or proper deference to the role of the states in the Federal system. The FCC explicitly acknowledged that the facilities were used for both interstate and intrastate communications, and

[25] *Chicago, R.I. & P. Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U.S. 426, 435 (1913).

[26] *Colorado* v. *United States*, 271 U.S. 153, 164-66 (1926).

[27] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168 (1968).

[28] *United States* v. *AT&T*, 57 F.Supp. 451, 454 (S.D.N.Y. 1944), affirmed, *Hotel Astor, Inc.* v. *United States*, 325 U.S. 837 (1945).

that while the facilities were designed to interconnect by switches with the interstate CCSA network, "the lines may be utilized alternatively to access a foreign telephone exchange located within the same state as the customer's terminal facilities." 56 F.C.C.2d at 19, Pet.App. at 27. The FCC specifically recognized that Section 2(b) of the Communications Act[29] denies it jurisdiction over intrastate communications, and expressly disclaimed any intent to assume jurisdiction over local exchange service, 56 F.C.C.2d at 21, Pet. App. at 33. What the FCC could not tolerate, however, were restrictions on authorized FX service which would frustrate the Congressional intent expressed in the Communications Act to make available an efficient, unified, nationwide communication service. 56 F.C.C. 2d at 19, 20, Pet. App. at 28, 29.

2. The FCC's decision affirmed on review by the District of Columbia Circuit is not in conflict with the statutory scheme or legislative history of the Communications Act.

Before the passage of the Communications Act of 1934, Federal regulation of communications facilities was not centered in one government body, although they were "inextricably intertwined in communication", and the responsibility for regulation was scattered without any governmental agency authorized to deal with communications problems as such.[30] The purpose of the Act was "to create a communication commission with regulatory power over all forms of electrical communication, whether by telephone, telegraph,

[29] 47 U.S.C. 152(b).

[30] "Study of Communications By an Interdepartmental Committee", 73rd Cong., 2d Sess. 6-7 (1934).

cable, or radio. * * * There is a vital need for one commission with unified jurisdiction over all of these methods of communication."[31] The First Vice President and Chairman of the Executive Committee of NARUC testified before House and Senate committees:[32]

> We endorse the principle of this bill, because it specifically reserves to the State Governments their rightful powers over *matters of purely State concern,* such as so-called "exchange" or local rates of telephone companies. [Emphasis added]

The arguments of petitioners that Sections 2(b) and 221(b) of the Communications Act[33] preclude the FCC's exercise of any jurisdiction over intrastate facilities, whether or not a segment of interstate communication, were carefully considered by the Fourth Circuit in *North Carolina I*[34] and *North Carolina II*[35] and in both cases rejected by a majority of the Court. In *North Carolina I* (by Senior Circuit Judges Hastie and Tuttle, sitting by designation, Circuit Judge Widener dissenting), it was noted that the FCC for some 30 years, without Congressional interference, had viewed and treated Section 2(b) of the Act as imposing no bar to its exercise of jurisdiction over facilities used in connection with both intrastate and

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[31] Sen. Rept. No. 781, 73d Cong. 2d Sess. 1 (1934).

[32] Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 132 (1934); Hearings on S. 2910 Before the Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess. 156 (1934).

[33] 47 U.S.C. 152(b), 221(b).

[34] Note 12 supra.

[35] Note 16 supra.

interstate telephone communications.[36] In *North Carolina II* (by Senior Circuit Judges Tuttle and Rives, sitting by designation, Circuit Judge Widener dissenting), the Court of Appeals held that just as the FCC has full statutory authority to regulate interstate-intrastate equipment to ensure the safety of the national network, there can be no statutory basis for the argument that FCC regulations serving other important interests of national communications policy are subject to state utility commissions.[37] Both decisions recognize that Section 221(b) is no bar, since its purpose is only to enable state commissions to regulate local exchange service in metropolitan areas extending across state boundaries.[38]

This Court has denied petitions for write of certiorari in both *North Carolina* cases.[39] No reason is presented to suggest a change of circumstances which would make the grant of the writ more appropriate at this time.

3. The decision of the District of Columbia Circuit is consistent with, and a direct lineal descendant of, the decisions of other Courts of Appeals.

The decision below implements the principles established in the decision of the Ninth Circuit affirming the authorization of specialized carriers and requiring established carriers to interconnect their fa-

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[36] Note 12 supra, 537 F.2d at 794-95.

[37] Note 16 supra, 552 F.2d at 1046-47.

[38] Note 12 supra, 537 F.2d at 795 and fn. 11; Note 16 supra, 552 F.2d at 1045.

[39] Notes 12 and 16 supra.

cilities;[40] the decision of the Third Circuit affirming the FCC's requirement that the established carriers must provide interconnection of FX and CCSA facilities;[41] and two decisions of the Fourth Circuit,[42] as well as a collateral decision of the First Circuit,[43] affirming FCC jurisdiction over facilities used in both interstate and intrastate communications. Certiorari having been sought and denied in the Ninth, Third, and two Fourth Circuit decisions, and not sought in the First Circuit case, there clearly is no basis for a grant of the writ in this case.

4. This case presents no important question of federal law, but rather a question of fact correctly resolved by the FCC.

The thrust of the petitions for a writ of certiorari is directed to a *factual* issue, whether the record was adequate for the FCC to have found that it was technically difficult to "split" the facilities so that one set of facilities would be used for interstate FX lines, and another set of facilities subject to state restrictions for intrastate use. Petitioners' objections were fully presented to and considered by the FCC. Bringing to bear on this question "the deposit of its experience, the disciplined feel of the expert",[44] the FCC concluded that requiring the customer to maintain two redundant facilities or to invest in expensive additional equipment simply because of jurisdictional conflicts was clearly not in the public interest and would violate its

[40] Note 5 supra.

[41] Note 9 supra.

[42] Notes 12, 16 supra.

[43] Note 13 supra.

[44] See *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 91 (1953).

statutory mandate to make available a unified, nationwide communication service. 56 F.C.C.2d at 19-20, Pet.App. at 28-30. The majority of the District of Columbia Circuit panel held that the FCC had "reasonably concluded" that it was impractical to separate interstate FX from intrastate FX service in this case. Pet.App. at 6.[45]

It requires no evidentiary hearing for the FCC to recognize that if interstate facilities were required to be separated, a customer seeking to obtain both services would be required to maintain two separate redundant facilities (one for interstate FX service, and one for intrastate FX service), and to incur the expense for additional equipment to restrict calls. When the same issue was raised in *North Carolina I* with respect to terminal equipment rather than the end segments of circuits, Senior Circuit Judge Hastie observed:[46]

> Usually it is not feasible, as a matter of economics and practicality of operation, to limit the use of such equipment to either interstate or intrastate transmissions.

[45] *AT&T* v. *FCC*, 551 F.2d 1287 (D.C. Cir. 1977), cited by CPUC (Pet. at 19-20) is inapposite. The issue in that case was a factual dispute whether a manual mobile telephone system adversely affected dial mobile service, where there was a conflict in the information furnished by the parties, not the practicability of separating interstate and intrastate service by the same facilities. Significantly, Chief Judge Bazelon supported the Court's opinion in both cases, obviously perceiving no inconsistency, and Circuit Judge Robinson, dissenting in this case, did not invoke the mobile telephone case in which he had also participated.

[46] Note 12 supra, 537 F.2d at 791.

In this regard, CPUC, a petitioner here, has itself earlier said, in granting SPCC its limited intrastate certificate of convenience and necessity:[47]

> No telephone corporation would ever build tandem interstate-intrastate systems. The waste involved would be monumental.

Not only is the FCC's conclusion patently reasonable and correct, but in any event, this is not the type of issue which could profitably engage the attention of this Court.

5. Petitioners err in suggesting that there are any special or important reasons for review.

No important principles of law that have not long been settled are involved. Several Circuit Courts have considered the same questions and reached the same results, without certiorari being granted. The amounts and business involved represent only an insignificant fraction of the revenues and business of PT&T, the complaining carrier. The Fourth Circuit said in *North Carolina II*[48] that

> petitioners cannot create an economic impact with the volume of their jeremiad. Their claims of economic impact are refrains of assertions that the FCC has consistently found to be unsubstantiated by evidence, conclusory, and based on unrealistic assumptions about market behavior. [Citations.]

In any event, if there is any adverse impact upon the local user, the matter is readily remedied by an adjustment in "jurisdictional separations" of inter-

[47] Note 19 supra, Pet.App. at 68.

[48] Note 16 supra, 552 F.2d at 1055-56.

state and intrastate revenues, and is under continuing review by the FCC.[49]

The decision of the District of Columbia Circuit serves a larger purpose in the public interest, in permitting both established and new communications carriers to engage in fuller and freer competition in providing specialized services, and in furthering the mandate of Section 1 of the Communications Act to provide a rapid, efficient, nationwide communications service with adequate facilities at reasonable charges.[50] A grant of the petitions for a writ of certiorari has not been justified.

[49] See *Specialized Common Carrier Inquiry*, note 2 supra, on reconsideration, 31 F.C.C.2d at 1108; *Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures*, 46 F.C.C.2d 214 (1974), 50 F.C.C.2d 574 (1974), 61 F.C.C.2d 766 (1976).

[50] 47 U.S.C. 151.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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